No. 80-396

ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE CITY OF NEWPORT, MAYOR HUMPHREY J. DONNELLY III, Individually and in His Office Capacity as Mayor, THE CITY COUNCIL for the City of Newport and LAWRENCE NEWSOME, JOHN H. WEST, ROBERT O. BEATTIE, RAYMOND H. CARR, EDWARD K. CORISTINE, JAMES F. RING, All individually and in their Official Capacity as Members of the City Council for the City of Newport, Rhode Island,

Petitioners,

v.

FACT CONCERTS, INC. AND MARVIN LERMAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, CONNECTICUT, HAWAII, INDIANA, MINNESOTA, MONTANA, NORTH CAROLINA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, VERMONT, WEST VIRGINIA, AND WYOMING, AND NATIONAL LEAGUE OF CITIES AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

KENNETH O. EIKENBERRY
Attorney General

MALACHY R. MURPHY
Deputy Attorney General

THOMAS R. BJORGEN
Assistant Attorney General
Temple of Justice
Olympia, Washington 98504
(206) 753-2552

Attorneys for Amicus State of Washington

[Additional List of Counsel on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

CHARLES A. GRADDICK
Attorney General
State Administrative Building
Montgomery, Alabama 36130
Attorney for State of Alabama

WILSON L. CONDON
Attorney General
Pouch K, State Capitol
Juneau, Alaska 99811
Attorney for State of Alaska

ROBERT K. CORBIN
Attorney General
1700 West Washington
Phoenix, Arizona 85007
Attorney for State of Arizona

CARL R. AJELLO
Attorney General
Capitol Annex, 30 Trinity Street
Hartford, Connecticut 06115
Attorney for
State of Connecticut

TANY S. HONG
Attorney General
State Capitol
Honolulu, Hawaii 96813
Attorney for State of Hawaii

LINLEY E. PEARSON
Attorney General
219 State House
Indianapolis, Indiana 46204
Attorney for State of Indiana

WARREN R. SPANNAUS
Attorney General
102 State Capitol
St. Paul, Minnesota 55155
Attorney for State of Minnesota

MICHAEL T. GREELY
Attorney General
Capitol Building
Helena, Montana 59601
Attorney for State of Montana

RUFUS L. EDMISTEN
Attorney General
Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Attorney for State of
North Carolina

LEROY S. ZIMMERMAN
Attorney General
Strawberry Square, 16th Floor
Harrisburg, Pennsylvania 17120
Attorney for
State of Pennsylvania

DENNIS J. ROBERTS II
Attorney General
Providence County Courthouse
Providence, Rhode Island 02903
Attorney for
State of Rhode Island

MARK V. MEIERHENRY
Attorney General
State Capitol Building
Pierre, South Dakota 57501
Attorney for
State of South Dakota

MARK WHITE
Attorney General
Capitol Station
Post Office Box 12548
Austin, Texas 78711
Attorney for State of Texas

JOHN J. EASTON
Attorney General
Pavilion Office Building
Montpelier, Vermont 05602
Attorney for State of Vermont

CHAUNCEY H. BROWNING
Attorney General
State Capitol
Charleston, West Virginia 25305
Attorney for
State of West Virginia

JOHN D. TROUGHTON
Attorney General
123 State Capitol
Cheyenne, Wyoming 82002
Attorney for State of Wyoming

EDWARD THOMPSON, JR.
National Association of
Counties
1735 New York Avenue, N.W.
Washington, D.C. 20036
Attorney for National
Association of Counties

ROSS B. DAVIS
Davis & Simpich
1301 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Attorneys for
National League of Cities

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF AMICI CURIAE	2
ISSUE	2
ARGUMENT	2
I. THIS COURT SHOULD DECIDE THE IMPORTANT ISSUE OF PUNITIVE DAMAGES ON ITS MERITS, WITHOUT PLACING ONE SIDE AT A DISADVANTAGE BY IMPOSITION OF THE "PLAIN ERROR" STANDARD	2
II. THE CONSTRUCTION OF § 1983 MOST IN KEEPING WITH THE INTENT OF CONGRESS AND THE DECISIONS OF THE COURT IS ONE EXCLUDING THE RECOVERY OF PUNITIVE DAMAGES	4
III. THE ALLOWANCE OF PUNITIVE DAMAGES IN ACTIONS UNDER 42 U.S.C. § 1983 WOULD SERIOUSLY JEOPARDIZE THE SMOOTH WORKING OF OUR FEDERAL SYSTEM	7
CONCLUSION	11

TABLE OF CASES

	Page
Carey v. *Piphus*, 435 U.S. 247 (1978)	*passim*
Carlson v. *Green*, 64 L.Ed.2d 15 (1980)	4, 6, 7, 10
Maine v. *Thiboutot*, 100 S.Ct. 2502 (1980)	9
Mitchum v. *Foster*, 407 U.S. 225 (1972)	8
Monroe v. *Pape*, 365 U.S. 167 (1961)	9
Pridgin v. *Wilkinson*, 296 F.2d 74 (10th Cir. 1961)	3
Richmond F. & P.R. Co. v. *Brooks*, 197 F.2d 404 (D.C. Cir. 1952)	3
Wood v. *Strickland*, 420 U.S. 308 (1975)	10
Younger v. *Harris*, 401 U.S. 37 (1971)	7

OTHER AUTHORITIES

25 C.J.S., Damages, § 117(1) (1966)	9
F.R.C.P. 51	3
42 U.S.C. § 1983	*passim*
Durchslag, Federalism and Constitutional Remedies, 54 N.Y.U. L.Rev. 723 (1979)	10
Schnapper, Civil Rights Litigation After Morrell, 79 Colum. L.Rev. 213 (1979)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-396

THE CITY OF NEWPORT, MAYOR HUMPHREY J. DONNELLY III, Individually and in His Office Capacity as Mayor, THE CITY COUNCIL for the City of Newport and LAWRENCE NEWSOME, JOHN H. WEST, ROBERT O. BEATTIE, RAYMOND H. CARR, EDWARD K. CORISTINE, JAMES F. RING, All individually and in their Official Capacity as Members of the City Council for the City of Newport, Rhode Island, *Petitioners*,

v.

FACT CONCERTS, INC. AND MARVIN LERMAN, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF OF STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, CONNECTICUT, HAWAII, INDIANA, MINNESOTA, MONTANA, NORTH CAROLINA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, VERMONT, WEST VIRGINIA, AND WYOMING, AND NATIONAL LEAGUE OF CITIES AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICI CURIAE

There is not a state in the Union which has not been the target of an action brought under 42 U.S.C. § 1983. The financial strain visited upon state treasuries by these suits is already overwhelming. If, now, the recovery of punitive damages is also to be allowed under § 1983, the impact on the states' balance sheets may be close to devastating. The amici states thus have a vital interest in arguing that a recovery under § 1983 should not include the award of punitive damages. The National League of Cities and National Association of Counties are non-profit associations of elected and appointed public officials at the municipal and county level, which join this brief with the consent of the petitioners and respondents.

ISSUE

In addition to full compensatory damages and attorneys fees, may punitive damages as well be imposed upon local governmental units in actions under 42 U.S.C. § 1983, when such punitive damages serve no deterrent purpose?

ARGUMENT

I. THIS COURT SHOULD DECIDE THE IMPORTANT ISSUE OF PUNITIVE DAMAGES ON ITS MERITS, WITHOUT PLACING ONE SIDE AT A DISADVANTAGE BY IMPOSITION OF THE "PLAIN ERROR" STANDARD.

The question of whether punitive damages are recoverable in a § 1983 action is one of potentially critical importance to the smooth functioning of the federal system. The development of a just and coherent body of law demands that an issue of such note be decided squarely on its merits, without the deck stacked in favor of one side through imposition of the "plain error" standard used by the Court of Appeals below. Granted, the City failed to object at trial to the punitive damages instruction to which it now assigns error. Granted, the pur-

pose behind the requirement of F.R.C.P. 51 that objections to instructions be raised at trial, the purpose of permitting the trial judge to evaluate the objection and correct his error, is a salutory one. It, however, may not be granted that the goal of avoiding an appeal which may, or may not, have been rendered unnecessary by an objection to an instruction is so momentous that it must be promoted even at the expense of deciding a crucial issue of law unswervingly on its merits. Such housekeeping ends may be promoted by less expensive means. The consequences of using the "plain error" standard in deciding this issue grow even more preposterous when it is realized that the threat of facing the stricter standard on appeal does not constitute much of an incentive to making timely objections in the first place. The overriding reason why counsel do make timely objections is to win at trial court. The threat of facing a "plain error" standard on appeal pales into oblivion beside the threat of an imminent loss. Finally, even if a timely objection to the instruction had been made at trial court, the purpose of requiring timely objections, that of avoiding unnecessary appeals, would still, in all likelihood, not have been served in this case, since the City has appealed on grounds independent of the awarding of punitive damages.

The administrative purposes served by penalizing the failure to object to instructions are minimal at best and are of far less import than is the end of rightly deciding a question of law, an end which lies at the heart of any system of justice. To handicap one side of the punitive damages issue by imposition of the plain error standard would be to sacrifice a square decision of a vital issue of law in the speculative interest of avoiding unnecessary appeals. This course must not be followed when the issue to be decided is of such consequence.[1]

---

[1] Doctrinal support for our position may be found in *Pridgin* v. *Wilkinson*, 296 F.2d 74 (10th Cir. 1961), and *Richmond F. & P. R. Co.* v. *Brooks*, 197 F.2d 404 (D.C. Cir. 1952).

The determination of which standard of review to employ is normally an important threshold step in any appellant's decision. In this case, however, the determination is of somewhat less significance, since no matter what standard be employed, the force of law and policy remain constant: Punitive damages are not recoverable under § 1983.

II. THE CONSTRUCTION OF § 1983 MOST IN KEEPING WITH THE INTENT OF CONGRESS AND THE DECISIONS OF THE COURT IS ONE EXCLUDING THE RECOVERY OF PUNITIVE DAMAGES.

This Court has not yet decided whether or not punitive damages are recoverable in a § 1983 action. *Carlson* v. *Green*, 64 L.Ed.2d 15, 42 (1980) (Rehnquist, J., dissenting). However, the proper role of damages in a § 1983 action, as outlined in *Carey* v. *Piphus*, 435 U.S. 247 (1978), suggests quite forcefully that punitive damages are not recoverable. The issue posed in *Carey* was whether a § 1983 plaintiff who had demonstrated that his rights of procedural due process had been violated had to prove actual injury by the deprivation before recovering substantial, nonpunitive damages. *Carey*, *supra*, at 253. In deciding that such a recovery was not available, the Court firmly established the *compensatory* nature of damages under § 1983. *Id.* at 254-56. Significantly, the Court left no doubt as to whether compensatory damages alone could fulfill the deterrent purpose of § 1983.

> ". . . To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages. . . ." *Id.* at 256-57.

Punitive damages are not compensatory damages. Since deterrence is the reason for imposing punitive damages, this pronouncement seems quite plainly to say also that there is no evidence that Congress intended to make punitive damages a part of § 1983.

The conclusion that punitive damages have no place in a § 1983 recovery is buttressed by what the Court did in *Carey*, as well as what it said. As part of their argument that general, presumed damages may be recovered in a § 1983 action, the plaintiffs in *Carey* argued that the need to deter violations justified the recovery of such damages. *Id.* at 254. The Court apparently did not find this argument persuasive, since it denied the requested relief. If general, nonpunitive, compensatory damages are not necessary to deter violations, then surely the more extreme, more clearly deterring remedy of punitive damages could not be necessary to deter violations. And, if punitive damages are not needed as a deterrent or punishment, the very reason for imposing them vanishes.

Reliance on the dictum contained in footnote 11 of the *Carey* opinion, *id.* at 257, is misplaced. That footnote must be read against the background of these distinct signals in the body of the opinion indicating that punitive damages are not recoverable in a § 1983 action. In footnote 11, the Court stated:

> "This is not to say that exemplary or punitive damages might not be awarded in a proper case under § 1983 with the specific purpose of deterring or punishing violations of constitutional rights. [Citations omitted.] Although we imply no approval or disapproval of any of these cases, we note that there is no basis for such an award in this case. . . ." *Id.* at 257.

This dictum must be taken for exactly what it is: An expression of the sound judicial policy of refraining from deciding questions not presented in the case or contro-

versy then before the tribunal. The footnote in no way dilutes the fact that the contours of a § 1983 recovery as developed in *Carey* leave no room for punitive damages.

It is unfortunate that the Court did not follow this same judicial policy in the subsequent case of *Carlson* v. *Green*, 64 L.Ed.2d 15 (1980). As the majority noted at the outset:

> "Two questions are presented for decision: (1) Is a remedy [for Eighth Amendment violations] available directly under the Constitution given that respondent's allegations could also support a suit against the United States under the Federal Tort Claims Act? and (2) . . ." *Id.* at 22.

The Court answered the first question in the affirmative, relying in part on an argument that a *Bivens*-type remedy would be more effective than a recovery under the Federal Tort Claims Act. A link in this argument was the holding that punitive damages are available in a *Bivens* suit, but not in an action under the Federal Tort Claims Act. The majority supported its conclusion that punitive damages are available in *Bivens* actions by remarking, almost offhandedly, that "[m]oreover, punitive damages are available in 'a proper' § 1983 action, *Carey* v. *Piphus*, 435 U.S. 247, 257, n.11 [1978] . . ." In this casual manner, as a remote, unneeded link in an argument concerning a *Bivens* action, an action which has no bearing on federal-state relations, the majority in *Carlson* apparently decided a question of the most critical importance to our federal system, without the question even being presented for decision. *See Carlson*, *supra*, at 6. Furthermore, this "decision" that punitive damages are available in a § 1983 action is apparently based entirely on footnote 11 in *Carey*, *supra*, a neutral dictum set in a case which otherwise signalled quite strongly that punitive damages were not available in a

§ 1983 action. Accord, *Carlson, supra,* at 42 (Rehnquist, J., dissenting).

An issue of as much import as the question of punitive damages in § 1983 actions must not be decided in as casual a fashion as was the case in *Carlson.* The offhand remark of the *Carlson* majority that punitive damages are available should not be considered dispositive of the issue. The considered description of the theory of § 1983 damages as set forth in *Carey,* a theory leaving no room for punitive damages, should be considered dispositive of the issue.

III. THE ALLOWANCE OF PUNITIVE DAMAGES IN ACTIONS UNDER 42 U.S.C. § 1983 WOULD SERIOUSLY JEOPARDIZE THE SMOOTH WORKING OF OUR FEDERAL SYSTEM.

One of the central geniuses of our form of government is the delicate balance of powers between the national government and the various state governments. This system has been aptly described as one

> ". . . in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States . . . ." *Younger* v. *Harris,* 401 U.S. 37, 44 (1971).

Our federalism, this respect for and deference to state functions and state sovereignty, ". . . occupies a highly important place in our Nation's history and its future." *Id.* at 45. It may well be that this "sensitivity to the legitimate interests of both State and National Governments" will prove to be our best defense against the Orwellian tendencies of large, overcentralized national

governments. Surely, our federalism has served us well thus far.

It little profits the political health of the nation to make sea-changes in the fragile balances of federalism without good reason to do so. The "vast transformation" in the concepts of federalism occasioned by the adoption of 42 U.S.C. 1983,[2] *see Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972), is an example of one such justified change in federal-state relations. In the turbulent years following the Civil War, many states were not providing effective protection of federally-secured rights. *Mitchum, supra*, at 240-41. The Congress deemed it necessary to interpose the federal courts between the states and the people in order to protect the people from unconstitutional action under color of state law. *Id.* at 240-42. Only after recognizing this compelling necessity did Congress pass § 1983 and set into motion the basic restructuring of federal-state relations its adoption entailed. Even that activist Congress recognized that tampering with the balances of our federal system was not to be undertaken lightly.

Not all momentous shifts in the equilibriums of federalism, however, take place with the suddenness of the adoption of the post-Civil War civil rights statutes. The past two decades, for instance, have seen a relentless expansion in the scope of the remedy afforded by § 1983, the cumulative effect of which is a definite shift in the balances of federal-state power. From a tool used largely to remedy and prevent deprivations of federal constitu-

---

[2] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

tional rights by state officials, *see, e.g., Monroe* v. *Pape*, 365 U.S. 167 (1961), *rev'd*, 436 U.S. 658 (1978), § 1983 is now something very close to a general damage remedy available to anyone who alleges a state has withheld from them some federal benefit in violation of any federal statute. *See Maine* v. *Thiboutot*, 100 S.Ct. 2502 (1980). This expansion alone may not signal any great tremor in federal-state relations, but when taken together with the fact that the heretofore extraordinary remedy of attorneys fees is now available to a prevailing plaintiff in a § 1983 action, no matter what federal statute is relied on and no matter what court the plaintiff may litigate in, *Thiboutot, supra*, at 2507, the old Ku Klux Act has become something close to a Sword of Damocles poised over the financial arteries of already strapped state and local governments. Now, to this real threat to the very solvency of state and local governments, respondents would add the spectre of punitive damages.

Our federalism simply will not work if a vital, aggressive central government is paired off against state and local governments paralyzed by an inability to raise revenues even for the provision of the most basic governmental services. The awarding of punitive damages to a § 1983 plaintiff makes such malfunctions of federalism likely, not merely because it increases the expenditures which a state or local government must bear, but because it creates the near inevitability of massive awards against cities, towns and counties which will drive some of those unfortunate governmental units to the edge of receivership. A rule of law having such dire implications for our federal system should be adopted only if it serves an otherwise important purpose. The allowance of punitive damages in § 1983 actions does no such thing.

The purpose of punitive damages is to punish the offender and to deter unacceptable conduct. 25 C.J.S., Damages, § 117(1) (1966). The threat of liability un-

der the modern, expanded version of § 1983, without the possibility of punitive damages, already serves as a potent deterrent against the deprivation of federal rights. As this Court recently stated in *Carlson* v. *Green*, 64 L.Ed.2d 15, 25 (1980),[3] "[i]t is almost axiomatic that the threat of damages has a deterrent effect[.]" Even more specific was the *Carlson* Court in footnote 6, referring to the deterrent effect of a *Bivens* remedy: "42 U.S.C. 1983 serves similar [deterrent] purposes." Accord, Schnapper, Civil Rights Litigation After Morrell, 79 Colum. L.Rev. 213, 244 (1979). *See also Carey* v. *Piphus*, *supra*, on p. 6. The deterrent effect which the *Carlson* Court recognized already inheres in the awarding of compensatory damages is magnified considerably by the possibility of an award of attorneys fees, the possibility of criminal liability on the part of state and local officials, *see* 18 U.S.C. 242, and the possibility of personal liability on the part of officials acting in bad faith. *Wood* v. *Strickland*, 420 U.S. 308, 321-22 (1975).

If a state or local governmental official or body is not deterred from taking action which may deprive a citizen of federally protected rights by this imposing threat of multiple civil and criminal liability, the possibility of punitive damages is not going to make any difference. The addition of punitive damages will not deter any conduct not already deterred by the current contours of a § 1983 recovery. The addition of punitive damages may, on the other hand, have perilous consequences for the smooth working of the federal system. This Court "has consistently recognized federalism concerns in interpreting civil rights laws." Durchslag, Federalism and Constitutional Remedies, 54 N.Y.U. L.Rev. 723, 735 (1979). What minimal, speculative benefits the cause of individual rights might obtain from the allowance of punitive damages in § 1983 actions is not worth the potential havoc such damages could create in our federal system.

---

[3] *See* p. 6, *supra*, for a more detailed discussion of this case.

CONCLUSION

Punitive damages have no place in a recovery under § 1983. The portion of the judgment below relating to punitive damages should be reversed and the case remanded to the District Court with appropriate instructions.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

MALACHY R. MURPHY
Deputy Attorney General

THOMAS R. BJORGEN
Assistant Attorney General
Temple of Justice
Olympia, Washington 98504
(206) 753-2552

Attorneys for Amicus
State of Washington

[Additional List of Counsel on Inside Cover]